

OCT 16 1975

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

KENT FRIZZELL, ACTING SECRETARY OF THE INTERIOR,
ET AL., *Petitioners*

v.

SIERRA CLUB, INC., ET AL., *Respondents*

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL., *Petitioners*

v.

SIERRA CLUB, INC., ET AL., *Respondents*

BRIEF

for Western Fuels Association, Inc., Basin Electric Power
Cooperative, Inc., Heartland Consumers Power District,
Lincoln Electric System, Missouri Basin Municipal
Power Agency, Tri-State Generation and Trans-
mission Association, Wyoming Municipal
Power Agency and Cajun Electric Power
Cooperative, Inc.

AS AMICI CURIAE IN SUPPORT OF PETITIONS FOR
A WRIT OF CERTIORARI

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INDEX

	Page
CITATIONS	i
DESCRIPTION AND INTEREST OF AMICI CURIAE	2
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	12

CITATIONS

CASES:

<i>Aberdeen & Rockfish R.R. v. SCRAP</i> , No. 73-1966, decided June 24, 1975	10
<i>Crow Tribe of Indians v. Frizzell, et al.</i> , No. 75-153 (D.D.C.)	10
<i>Environmental Defense Fund, Inc. v. Armstrong</i> , 487 F.2d 814 (9th Cir.), affirming 356 F.Supp. 131 (N.D. Cal. 1973)	11
<i>Jicarilla Apache Tribe of Indians v. Morton</i> , 471 F.2d 1275 (9th Cir. 1973)	11
<i>Sierra Club v. Callaway</i> , 499 F.2d 982 (5th Cir. 1974)	11
<i>Sierra Club v. Morton</i> , 514 F.2d 856 (D.C. Cir. 1975)	2
<i>Sierra Club v. Stamm</i> , 507 F.2d 788 (10th Cir. 1974)	11
<i>Trout Unlimited v. Morton</i> , 509 F.2d 1276 (9th Cir. 1974)	11

STATUTES:

Act of June 21, 1906, 34 Stat. 326, 25 U.S.C. § 391 <i>et seq.</i> (1970 ed. & Supp. III)	10
Mineral Leasing Act of 1920, 30 U.S.C. § 201 <i>et seq.</i> (1970 ed. & Supp. III)	7
National Environmental Policy Act of 1969, 42 U.S.C. § 4331 <i>et seq.</i> (1970)	11

MISCELLANEOUS:

Burns & McDonnell Consulting Engineers, <i>Preliminary Report on the Feasibility Study for the Laramie River Station</i> , July 1, 1975	6
Petition for Writ of Certiorari, <i>Frizzell et al. v. Sierra Club et al.</i> , Docket No. 75-552, filed October 9, 1975, at 8	7

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**AS AMICI CURIAE IN SUPPORT OF PETITIONS FOR
A WRIT OF CERTIORARI**

This brief is submitted in support of the petitions of
Kent Frizzell, et al., and of American Electric Power

System, et al., for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Sierra Club v. Morton*, et al., 514 F.2d 856. All parties have consented to the filing of this brief and their consents have been lodged with the Clerk.

DESCRIPTION AND INTEREST OF AMICI CURIAE¹

Western Fuels is a non-profit membership corporation whose purpose is to obtain coal and other fuel supplies required for the generation of electric energy by its members to serve the needs of the consumers of each member. Western Fuels membership comprises consumer owned and publicly owned electric utilities. Basin, Tri-State, Cajun and Lincoln are members of Western Fuels.

Basin is a generation and transmission cooperative headquartered in Bismark, North Dakota. Basin was organized by member cooperatives to provide constituent members with self-generated thermal power. Basin, through its member cooperatives, serves more than 100 rural electric cooperatives in North and South Dakota, Montana, Wyoming, Colorado, Nebraska, Minnesota and Iowa. Through this system of distribution, Basin serves the power needs of more than 300,000 rural families, businesses and industries, a group in excess of one million people. The great

¹ The following references identify the respective amici curiae: Western Fuels Association, Inc.—“Western Fuels”; Basin Electric Power Cooperative, Inc.—“Basin”; Heartland Consumers Power District—“Heartland”; Lincoln Electric System—“Lincoln”; Missouri Basin Municipal Power Agency—“MBMPA”; Tri-State Generation and Transmission Association—“Tri-State”; Wyoming Municipal Power Agency—“WMPA”; Cajun Electric Power Cooperative, Inc.—“Cajun”.

majority of Basin's ultimate consumers are rural families.

Heartland is a public corporation and political subdivision of the State of South Dakota. Heartland's function is to engage in wholesale bulk power supply and activities incidental or related thereto. Heartland is required to sell electrical energy at wholesale directly to any municipality, political subdivision, rural electric association, electric distribution cooperative, or any person, firm, association or corporation which in turn generates, transmits or distributes electricity on a non-profit basis in the State and which is engaged in the distribution and sale of electric energy. When any such entity makes application for the purpose of electric energy, Heartland must supply that power if it has the requested amount of electric energy available. At present, Heartland has fourteen members, thirteen of whom are municipal utilities located in South Dakota and one is a municipal utility located in Iowa.

Lincoln is a municipal utility owned by the City of Lincoln, Nebraska. The territory served by Lincoln encompasses the city limits and approximately three miles surrounding those limits. In addition, Lincoln owns and operates facilities serving surrounding villages and towns and assorted rural customers. Lincoln's energy requirements have nearly doubled since 1967. The major portion of its service area is the City of Lincoln which is a growing community with a diversified economy that links the large agricultural area nearby with areas of commerce, industry, government, and higher learning. The seat of the state and county government and the site of the 20,000 student University of Nebraska, Lincoln is also recog-

nized as a regional trade center. Lincoln's service area has a population of some 175,000.

MBMPA is a non-profit organization comprised of municipal utilities in the States of Iowa, Minnesota and South Dakota. MBMPA membership includes sixty-one systems serving a population base of approximately 220,000. MBMPA serves as a planning center and acts as a bargaining agent to supplement the power supply efforts of the individual member municipalities which are necessarily limited on a localized basis. This function of the agency offers the membership alternate planning schemes that incorporate the economies of scale ordinarily not available to individual municipal utilities when acting independently.

Tri-State is a non-profit wholesale power supplier for twenty-five distributing consumer owned utilities located in Colorado, Nebraska and Wyoming. Tri-State serves a 125,000 square mile area covering the western part of Nebraska, north-eastern Colorado, and a major part of Wyoming. Through its 25 distribution members, Tri-State serves more than 95,115 consumers. Although the majority of consumers are classified as rural residential, some are industrial and commercial.

WMPA is a non-profit organization comprised of nine Wyoming municipal utilities. WMPA was formed to supply supplemental power to its members after 1976 because their present supplier, the United States Bureau of Reclamation, will be unable to serve load growth of such members beyond 1976. WMPA is charged by its members to obtain supplemental power in the most economical manner, either through generation or purchase.

With the exception of Western Fuels, each of the aforementioned entities is a preference customer of the Bureau of Reclamation and purchases a substantial portion of their power and energy requirements from the Bureau. The Bureau is a federal agency, within the Department of the Interior, which markets the output of the federal government's extensive complex of hydroelectric projects in the Missouri River basin and elsewhere.

Basin, Heartland, Lincoln, MBMPA, Tri-State and WMPA, a map of whose service areas is included as Appendix A, have undertaken to construct the Laramie River Station, a large, thermal-electric generating plant to be located in Platte County in southeastern Wyoming. The site of the Laramie River Station is indicated on the map at Appendix A.

The Laramie River Station will have a net generating capacity, to be used for the benefit of the six participants, of 1500 megawatts, consisting of three 500 megawatt units, at an estimated construction cost, including backbone transmission lines, of some \$1,360,000,000. On line dates for availability of power from the Laramie River Station are no later than January 1, 1980 for the first unit, June 1, 1980 for the second unit and June 1, 1983 for the third unit.

The location, construction schedule and capacity of the Laramie River Station were determined as the result of extensive studies initiated by the participants in 1972, covering site, water and fuel supply, transportation facilities, transmission and economics.

These studies themselves represent a continuation and acceleration of joint planning efforts going back as far as 1962 on the part of consumer owned utilities

in the upper Missouri River Basin, covering all or parts of Montana, Wyoming, Colorado, North and South Dakota, Nebraska, Minnesota and Iowa. A major factor giving rise to this joint planning was the fact that the hydroelectric power available from the federal government's Pick-Sloan Missouri River Basin project and from other federal government hydroelectric power developments was insufficient to meet their load growth.

The objective of the joint planning is the installation of generating and transmission facilities on a schedule meeting power needs in a fashion calculated to achieve for the participants the economies of scale inherent in the construction of large base-load generating units, the advantages of integrating fossil-fueled generating units with the hydro-generation developments undertaken by the federal government as a part of the Pick-Sloan Missouri River Basin project, and the advantages of pooling together transmission facilities with costs shared on a proportionate use basis.

The power requirements of the consumers served by the six participants in the Laramie River Station are such that demand will exceed supply, with an ever-widening gap between need and supply, if the in-service schedules referred to above—i.e., unit one - January 1, 1980, unit 2 - June 1, 1980 and unit 3 - June 1, 1983—are not met.²

An important factor in the selection of the site for the Laramie River Station is its proximity to the

² For a detailed discussion and analysis of the participants' load growth and power supply needs, see "Preliminary Report on the Feasibility Study for the Laramie River Station," July 1, 1975. Burns & McDonnell Consulting Engineers. Copies will be made available to all parties and to the Court upon request.

Eastern Powder River Coal Basin of Wyoming which, as the Federal-Petitioners point out, contains more than one quarter of the nation's strippable coal reserves.³

Western Fuels is responsible for securing the coal supplies for the Laramie River Station. It has arranged for three separate sources of coal from the Eastern Powder River Coal Basin.

Western Fuels has acquired applications pending before the Department of the Interior for the issuance of preference right coal leases under Section 2 of the Federal Mineral Leasing Act of 1920, 30 U.S.C. 201, covering Eastern Powder River Coal Basin coal, which it estimates will produce at least 60 million tons of coal by surface mining.

Western Fuels has contracted with Sunoco Energy Development Co. for the purchase of 60 million tons of coal from the Cordero Mine in the Eastern Powder River Coal Basin on a delivery schedule consistent with start-up needs at the Laramie River Station. Sun holds the Cordero Mine under a lease from the Secretary of the Interior issued in 1971 pursuant to the coal leasing provisions of the Federal Mineral Leasing Act. 30 U.S.C. 201, *et seq.*

Western Fuels has entered into contractual arrangements with El Paso Energy Resources Company, which itself has acquired certain preference right lease applications for coal in the Eastern Powder River Coal Basin pending before the Department of the Interior, under which coal will be supplied from that source.

³ Petition for Writ of Certiorari, *Frizzell, et al. v. Sierra Club, et al.*, at 8.

Sun's application for approval of the mining plan for the Cordero Mine is presently before the Secretary of the Interior. A site-specific environmental impact statement covering the mining plan is under preparation by the Department of the Interior. Analyses within the Department of the Interior of the applications for preference right leases held by Western Fuels and El Paso are in progress.

The court below clearly considers the Eastern Powder River Coal Basin to be encompassed within the larger "Northern Great Plains Region" which is the subject of its judgment and injunction.

The admonition by the court below that the federal defendants take no action anywhere in the "Northern Great Plains Region" which would defeat the purpose of an environmental impact statement for the "Northern Great Plains Region" while the need for the latter is evaluated necessarily results in delay in final actions on Eastern Powder River coal sources of critical importance to the participants in the Laramie River Station, at least until a regional impact statement is issued and approved or until further lengthy litigation ensues. In the absence of a reliable source of coal from the Eastern Powder River Coal Basin, the timing of the completion and operation of the Laramie River Station is delayed and, indeed, the entire project may be placed in jeopardy, with resultant irreparable harm not only to the consumers of electric energy in participants' service areas, but to the general economy of those areas as well.

Cajun is a non-profit electric power system serving rural customers in Louisiana. Cajun is a wholesale power supplier for twelve of the thirteen rural electric

cooperatives now existing in Louisiana. Cajun's members' service areas encompass approximately 80% of the surface area of the State, and have a population of approximately 750,000.

Cajun presently generates 35% of its requirements from Big Cajun No. 1, and purchases the remainder of its requirements from investor owned utilities in Louisiana. Based on representations of its suppliers that Cajun will no longer be able to rely on them to meet its power and energy needs, Cajun is in the process of developing two additional 540 megawatt coal fired generating units to be known as Big Cajun No. 2. The first of these units is scheduled to go on line in the last quarter of 1979; the second in the third quarter of 1980. Both are needed if Cajun is to meet increasing requirements for reliable and economical power and energy for Louisiana's rural people, agriculture and industry in the 1980's. When fully operational, Big Cajun No. 2 will require approximately four million tons of coal per year.

To assure an adequate source of coal, Cajun has executed a contract with Shell Oil Company for coal to be mined from the Youngs Creek Mine in Big Horn County, Montana, on the Crow Indian Reservation, a part of the "Northern Great Plains Region" as conceived by the court below. In addition, Cajun has executed a contract with Pullman Standard, division of Pullman, Inc., for 848 open top gondola cars to ship by rail Youngs Creek coal from Montana to St. Louis, Missouri. From St. Louis, American Commercial Barge Line Co. has contracted to barge the coal on the Mississippi River to the Big Cajun No. 2 plant site.

Shell Oil Company's right to Youngs Creek coal is derived by virtue of a lease issued Shell by the Crow

Tribe. Pursuant to 25 U.S.C. 391, *et seq.*, the Secretary of the Interior has the jurisdiction to approve mineral leases of Indian lands by various Indian tribes, including the Crow Tribe.⁴ As a corollary to this jurisdiction, the Secretary has, by regulation, exerted jurisdiction over the actual extraction of minerals by virtue of requiring Department approval of mining plans developed by the leaseholder.

Shell is in the process of securing Department approval for its coal development and, thus, the decision of the Court below effectively enjoins the federal defendants from going forward on approval of the Youngs Creek Mine. As a result, in a fashion similar to the consequences of the delays in federal approvals needed for the coal supply for the Laramie River Station, the timely delivery of coal for Big Cajun No. 2 is endangered, thereby jeopardizing the power supply for Cajun's rural customers.

REASONS FOR GRANTING THE WRIT

Amici curiae join the Federal-Petitioners and the Intervenor-Petitioners in their analyses of the reasons for the granting of this writ.

Briefly, these reasons are: that the decision below is in conflict with this Court's decision in *Aberdeen & Rockfish RR v. SCRAP*, No. 73-1966 (June 24, 1975); that the decision below is in conflict with decisions in the Court of Appeals for the Fifth, Ninth and Tenth

⁴ The lease was approved by the United States Department of the Interior on June 8, 1972. The validity of the Shell lease, along with other Crow Tribe leases, is presently being challenged in the United States District Court for the District of Columbia in *Crow Tribe of Indians v. Dale K. Frizzell, et al.*, No. 75-153.

Circuits;⁵ that this case is of vital importance in interpreting the National Environmental Policy Act;⁶ and that the decision below was in error in that it did not affirm the district court's judgment that there was no existing or proposed federal program for the development of coal in the region described by the Complainants, thus, the National Environmental Policy Act does not require the issuance of an environmental impact statement.

In amplification of the rationale behind this final reason for granting the writ, these amici curiae emphatically state that they are in no way taking part in any existing or proposed regional federal programs for either coal development or additional power supply. Indeed, these amici curiae know of no such programs and, to the contrary have been required to undertake to develop their own programs of power development and fuel supply, in part due to the urgings of the federal government's power marketing agencies. Western Fuels, the Laramie River Station, Big Cajun No. 2, and the actions taken to procure coal herein described, were initiated, fostered and carried on by the respective parties themselves. The actions taken, and to be taken by the federal government in regard to these energy related activities is not one of initiation or proposal. Rather, the federal government is merely fulfilling its duty to act upon independently conceived

⁵ *Sierra Club v. Callaway*, 499 F. 2d 982 (5th Cir. 1974); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F. 2d 1275 (9th Cir. 1973); *Environmental Defense Fund, Inc. v. Armstrong*, 487 F. 2d 814 (9th Cir.), *affirming* 356 F. Supp. 131 (N.D. Cal. 1973); *Trout Unlimited v. Morton*, 509 F. 2d 1276 (9th Cir. 1974); *Sierra Club v. Stamm*, 507 F. 2d 788 (10th Cir. 1974).

⁶ 42 U.S.C. 4321, 4331-4335, 4341-4347.

proposals and applications presented by private parties.

CONCLUSION

In light of the error of the judgment below and the gravity of the issues involved, the writ of certiorari should be granted.

Respectfully submitted,

Dated: October 16, 1975

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CERTIFICATE OF SERVICE

I, Edward Weinberg, hereby certify that on October 16, 1975 the Brief for Amici Curiae in Support of Petitions for a Writ of Certiorari in the above captioned proceeding was served upon all counsel, pursuant to Rule 33 of the Supreme Court Rules, by mailing copies by first class mail, postage prepaid, as follows:

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APPENDIX

APPENDIX "A"

